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No. 09-1218

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In The
Supreme Court of the United States

CORLINE ALLEN, Individually and on behalf of all others similarly situated; ALL PLAINTIFFS; LORENZO ARGUIRRE; THEOTIS ANDERSON; GERARDO AVALOS; ET AL.,

Petitioners,

v.

MCWANE, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR PETITIONER

Petitioners Corline Allen, et al., respectfully submit this Reply to Respondent McWane, Inc.'s Brief in Opposition to Petition for Writ of Certiorari. Rule 15.6, R. Sup.Ct.

SUMMARY

In its Opposition, McWane distorts an aspect of ultimate significance in this case—the law regarding the burden of proof.

The issues raised in the Petition for Writ of Certiorari impact millions of employees working for tens of thousands of employers nationwide. These affected employees and their employers operate pursuant to the terms of collective bargaining agreements ("CBAs"). As this Court has put it, CBAs create the "new common law" at a particular plant or within a particular company. Pet. at 10-11, citing *Transportation Union v. Union Pacific R. Co.*, 385 U.S. 157, 160-161 (1966). An important issue relating to this "new common law," the employer's burden of proof under 29 U.S.C. § 203(o) of a "custom or practice" of excluding payment for clothes changing under the terms of a CBA, is improperly dismissed by McWane in its Opposition. This important issue will be addressed in this Reply.

At stake is whether employers who have entered into a CBA with their employees may avoid the burden of proof requiring them to establish a "custom or practice" under a CBA of nonpayment for clothes changing time. McWane would have the

existence of a custom or practice inferred in favor of the employer on summary judgment—and thus "proven" as a matter of law—based solely upon the existence of a practice of non-payment for clothes changing time, the silence of the employees and the passage of time. However, McWane's purported proof does not meet the evidentiary test for establishing a custom or practice under a CBA articulated by this Court *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 154 (1969) (*Shore Line*). In *Shore Line*, the three elements of the proof of a "custom or practice" under a CBA were articulated as (1) time, (2) knowledge and (3) acquiescence based on that knowledge. The proof advocated by McWane eviscerates the *Shore Line* elements of (2) knowledge, and (3) acquiescence based on that knowledge. In fact, in the case before the Court, Petitioners introduced undisputed summary judgment evidence affirmatively showing they had no knowledge of a right to pay for pay for clothes changing, they did not bargain the issue in negotiations for their CBAs and they did not acquiesce to non-payment for this time. App. 29-30; App. 43-45. These issues squarely address the evidentiary test set out in *Shore Line*.

In addition, while McWane asserts that a petition for writ of certiorari in an earlier case, *Anderson v. Cagle's*, No. 07-910, was denied for reasons "almost identical" to the matters at issue in this petition, a review of that denial shows that the petition in *Cagle's* addressed issues different from the issues presented here by Petitioners. Indeed, with respect to *Shore Line's* required elements of knowledge and acquiescence based on that

knowledge, the undisputed record in this case contains evidence exactly opposite to the facts of *Cagle's*. In *Cagle's*, the plaintiffs affirmatively discussed the employer's non-payment of time for clothes changing. Here, the parties did not discuss or negotiate payment for this time.

Finally, Petitioners will point the Court to the record to identify untrue facts McWane misrepresented as true in its Opposition argument.

McWane seeks to minimize the significance of this case through its mischaracterizations of important law and fact. Ultimately, McWane's distortions underscore the weakness of its overall argument.

ARGUMENT

1. McWane Ignores the Circuit Split Regarding § 203(o) and the Burden of Proof, a Central Issue Before the Court.

In its Opposition, McWane fails to make any substantive argument relating to the Fifth Circuit's detailed discussion of the circuit split regarding the burden of proof issue and its relevance. McWane also fails to respond to Petitioners' full arguments regarding the proper characterization of § 203(o) as either an exemption from or a definition of the Fair Labor Standards Act. Pet. 11-12. McWane's argument on the burden of proof rests upon a claim that "once [it] demonstrated its longstanding policy of non-compensation, the burden fell to [Petitioners]..." (Brief in Opp. 11), and a contention

that it is "doubtful" that the Circuits are even split on the issue (Brief in Opp. 5). McWane's argument goes no deeper than those two claims.

It must be recognized that the characterization of 29 U.S.C. § 203(o) as either an exemption or definition of the FLSA is outcome determinative in this litigation. On one hand, if § 203(o) is treated as a definition, Petitioners carry the burden of proof. On the other hand, if § 203(o) is treated as an exemption to the FLSA, then McWane carries the burden of proof. The Circuits are split on the issue, with the Ninth Circuit holding § 203(o) is an exemption, and Third, Fifth, and Eleventh Circuits holding § 203(o) is a definition to the Act.[1]

Contrary to the position of McWane, it is clear that the split between the Circuits is a matter of significance. Indeed, this case exemplifies why the two diametrically opposed characterizations of § 203(o) cannot exist simultaneously among the Circuits.

The conflict between the Circuits as to where and how the burden of proof falls—discussed below by the Fifth Circuit for three full pages, App. 18-20—is the *raison d'être* for its erroneous finding that mere inference of knowledge and acquiescence

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[1] *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003); *Turner v. City of Philadelphia*, 262 F.3d 222, 226-227 (3d Cir. 2001); *Corline Allen, et al. v. McWane, Inc.*, 593 F.3d 449, 458-459 (5th Cir. 2010); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 957 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2902 (2008).

results in a burden against the employer.[2] Whether summary judgment procedure and burden based on inference permit employers to establish customs or practices under CBAs based on time and employee silence alone, in lieu of the *Shore Line* test, is a new, unique and important question deserving of clarification. The need to give effect to intervening cases is also at issue. *E.g.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

McWane's simple argument on this issue is telling. Consistent with the Fifth Circuit's decision, McWane notes that it established that the parties were basically aware of a time to report to work, and concludes that it therefore, without any additional evidence of knowledge or acquiescence, meets the burden of proof to establish a § 203(o) custom or practice under a CBA for non-payment for clothes changing. In fact, McWane presented no evidence on *Shore Line*'s required elements of time, knowledge, and acquiescence. Instead, McWane merely alleged there was *no evidence to disprove* those elements. That dramatic consequence tells this Court all it needs to know about the significance of interpreting 29 U.S.C. § 203(o) as an exemption,[3] and why the Circuits are and will continue to be divided.

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[2] It must be noted that the Fifth Circuit's ruling on this issue is in direct conflict with this Court's articulation of the necessary elements in *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 154 (1969) (*Shore Line*).

[3] FLSA exemptions are to be narrowly construed against the employer, which ought to further foreclose any inference of required elements of proof against the employees on summary judgment. App. 18, *citing Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

2. This Case Reflects an Extension of the Rule in *Anderson v. Cagle's, Inc.* Beyond its Facts, and Thus Presents Different Issues for Certiorari.

McWane also ignores the key distinction between this case and *Anderson v. Cagle's, Inc.*, No. 07-910, where certiorari was denied.

As in *Cagle's*, McWane was permitted to satisfy its burden of proof by putting in no evidence and merely alleging that petitioners had *no evidence to disprove* the elements of time, knowledge, and acquiescence. App. 19. However, in this case, the allocation of the burden of proof was also used to justify summary judgment inferences in the movant, McWane's, favor, on the required elements of knowledge and acquiescence:

> Although Allen argues that McWane cannot prevail by merely submitting evidence of the number of years that its policy of non-payment has been in effect, "[s]ince the burden of proof is on [Allen], we reject [the] argument that summary judgment to [McWane] was improper because [McWane] presented minimal evidence."

App. 19-20.

> It is undisputed that McWane has never compensated its employees for changing time, going as far back as 1965. After more than forty years of noncompensation, we may safely *infer*

> that McWane's employees had knowledge of and acquiesced to the policy of non-compensation. Therefore, we conclude that McWane has demonstrated a "custom" of non-compensation for changing time.

App. 17 (emphasis added).

The Fifth Circuit's inferences in McWane's favor[4] with respect to the required elements of knowledge and acquiescence distinguish this petition from the one denied in *Cagle's*.

In *Cagle's*, the plaintiffs admitted in deposition testimony their awareness of their employer's nonpayment policy and they even discussed it in union meetings.[5] Brief in Opposition to Pet. for Certiorari in No. 07-910 at 7-8, 2008 WL 378900 (Feb. 7, 2008) (quoting deposition testimony). The plaintiffs' own deposition testimony in *Cagle's* thus clearly established the necessary elements of knowledge and acquiescence.

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[4] The Fifth Circuit had already placed the burden on the petitioners to disprove the elements of knowledge and acquiescence. App. 18-20. After inferences were made in McWane's favor on those elements, there was no evidence that Petitioners could have offered to overcome the adverse inferences.

[5] Similarly, in *Turner v. City of Philadelphia*, 262 F.3d 222 (3d Cir. 2001), it was admitted that the union president "proposed at several labor management meetings with the Commissioner and Deputy Commissioner of Prisons, and with Philadelphia's Labor Relations Administrator, that change time be made compensable." *Id.* at 225.

Consequently, neither the effect of the burden of proof allocation (and thus the conflict between the Circuits regarding the characterization of § 203(o)) nor the conflict with this Court's own test in *Shore Line* were even remotely at issue in the petition for certiorari in *Cagle's*.

Those issues are squarely and cleanly presented here. With respect to *Shore Line*'s required elements of knowledge and acquiescence, the summary judgment record in this case is exactly the opposite of *Cagle's*. Here, Petitioners presented evidence disproving these required elements and, on summary judgment, that evidence must be taken as true. App. 29-30 ("The court accepts as true the statements made in the declarations that the issue of donning and doffing of protective gear was never discussed in union meetings or with management during the negotiations of the respective CBAs"). Petitioners' evidence affirmatively shows they had no knowledge of nor did they acquiesce to a custom or practice of non-payment for time spent in changing clothes. Significantly, this was not the evidence before the Court in *Cagle's*. *See* App. 43-45 ("In fact, however, I did not know either of these things at the time I participated in negotiating the collective bargaining agreements for my facility and did not raise the issue of compensation for donning and doffing personal protective equipment. At no time was the issue of non-compensation for clothes changing involving the donning and doffing of personal protective equipment discussed, understood or accepted.").

3. McWane's Brief Contains at Least Two Gross Factual Errors.

In its Opposition, McWane asserts, without support or citation, that

> The hypothetical "molten metal pourer" of Allen's petition (Pet. at 21) is in fact paid for donning and doffing any specialized items of protective gear such as "face shields, aprons and flame-resistant aluminum-clad clothing," as are all other workers whom McWane requires to don and doff such specialized items.

Brief in Opp. at 10. The opinions of the lower courts and the record materials in Petitioners' Appendix show McWane's assertions to be completely false. Petitioners' claims cover *all* pre- and post-shift donning and doffing of *all* personal protective equipment, *none* of which was compensated by McWane. App. 2 ("sought payment for pre- and post-shift time spent donning and doffing protective gear"); App. 3 ("sought compensation for time spent putting on and taking off gear before and after their scheduled shifts"); App. 25 ("plaintiffs' claims for overtime compensation for time spent donning and doffing protective gear at the beginning and end of the plaintiffs' shifts at the defendant's unionized facilities"); App. 28-29 ("It is also not disputed that employees in each unionized facility have not been paid for time spent donning and doffing protective gear at the beginning and end of their work shifts"); App. 42-43 ("At my facility, employees don and doff

required personal protective equipment, which can include: hard hats, earplugs, safety glasses with side shields, prescription safety glasses with side shields, gloves, aprons, rain gear, paper suits, rubber steel-toed boots, steel-toed boots or steel-toed shoes with metatarsal guards, heat jackets, flame resistant jackets, disposable coveralls, face shields, spats, back braces, wrist braces, aluminized clothing, metatarsal shoes, paper masks, flame retardant hoods, flame retardant sleeves, flame retardant leggings, cutter shirts, respirators, helmets, and chaps. . . . At no time was the issue of non-compensation for clothes changing involving the donning and doffing of personal protective equipment discussed, understood or accepted.").[6]

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[6] The summary judgment below and this Petition are limited to the issue of the compensability for time spent donning and doffing protective gear. App. 25 (holding limited to "time spent donning and doffing protective gear at the beginning and end of the plaintiffs' shifts at the defendant's unionized facilities"). On June 16, 2010, after the Petition for Writ of Certiorari was filed by Petitioners, the Administrator of the Department of Labor issued an Interpretation which includes in its reasoning a review of the central issue of this Petition. While the Administrator did not specifically provide the Department's position on the issue currently before this Court, in only the second Interpretation issued this year, the Administrator referenced these matters and reinforced the ongoing national significance of compensation for donning and doffing personal protective equipment. U.S. Department of Labor Administrator's Interpretation No. 2010-2, *available at* http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.pdf (last visited Jun. 21, 2010). Regardless of compensability, under both the Administrator's Interpretation and this Court's opinion in *IBP, Inc. v. Alvarez*, the donning and doffing of protective gear is a "principal activity" that starts and stops the employee's continuous workday. *Id.* at 4-5

McWane also asserts, again without support, that Petitioners are urging an "express negotiation" requirement or test in order to establish a "custom or practice" under a CBA. Brief in Opp. at 12. Petitioners could not have been more clear that the test is one of time, knowledge, and acquiescence, set out by this Court in *Shore Line*, and that, as in *Cagle's*, those elements may be concretely proven in many ways, other than evidence of express negotiation. Pet. at 13 & 17. Petitioners' point is merely that they must be proven, not hypothesized by McWane or openly inferred by the court of appeals. *Cf.* App. 17.

McWane's disregard for the record pervades its arguments, including (1) its failure to recognize the significance of the conflict among the Circuits regarding § 203(o); and (2) its closely related failure to properly distinguish the petition in *Anderson v. Cagle's, Inc.*, No. 07-910, where knowledge and acquiescence were admitted instead of inferred.[7] These failures are the very matters that illustrate the unique insight and clarity that this Court can provide to employers and employees on important

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[7] The magistrate also rejected McWane's attempt to present testimony from corporate representatives hypothesizing knowledge and acquiescence on the part of the employees, when those corporate representatives were not even working at the facilities for the relevant years including the CBA negotiations. App. 29 n.2 (sustaining objection) and App. 43-44 (declaration of union representative stating personal knowledge that the McWane corporate representative was not involved in CBA negotiations and did not begin working at the plant until after the most recent CBA had been negotiated and gone into effect).

matters of collective bargaining law which otherwise will go unresolved.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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